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No. 820

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA, *Petitioner,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether it was an abuse of the discretion confided to him by Section 7805(b) of the Internal Revenue Code for the Commissioner of Internal Revenue, with knowledge of all the relevant circumstances including respondent's request for parity of treatment which was pending before him for nearly two and a half years, to apply an excise tax to certain computer systems manufactured by respondent while at the same time excusing respondent's competitor from payment of the same tax on identical systems.

STATUTE INVOLVED

Section 7805(b) of the Internal Revenue Code provides:

> "(b) *Retroactivity of Regulations or Rulings.*—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."

STATEMENT

During the years involved here respondent IBM and Remington Rand were the two principal manufacturers and marketers of electronic computers. IBM's Type 604 computer systems and Remington's Univac 120 and 60 systems were identical in all significant respects. (Pet., p. 31a). From 1951 until April 1955 both companies collected from their customers and paid, in respect of these systems, a 10 per cent manufacturers excise tax imposed by Section 4191 of the Internal Revenue Code of 1954 and its predecessor section on the sale or lease of certain named "business machines."[1] (Pet., pp. 31a, 37a-38a).

On April 13, 1955, Remington requested a ruling from the Commissioner of Internal Revenue that its Univac computers were not "business machines" and hence were not subject to tax. Two days later, on April 15, the Commissioner issued such a ruling in the form of a telegram from the Chief of the Excise Tax Branch to Remington, which thereupon ceased collecting the tax from its customers and paying it to the Government. (Pet., p. 32a).

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[1] This tax has since been repealed. Excise Tax Reduction Act of 1965, § 206, 79 Stat. 140.

IBM learned of this ruling from its customers and on July 13, 1955, wrote the Internal Revenue Service requesting a similar ruling for its identical Type 604 computers. IBM's letter was captioned *"Urgent! Please Expedite."* It referred to Remington's ruling and pointed out the identity of the two companies' systems. In view of the grave competitive implications of different tax treatment of these identical and competing systems, IBM requested the Service to rule immediately and to inform IBM of its ruling by collect telegram. (Pet., pp. 32a-33a).

It was at this point, at the latest, that the Commissioner was put on notice that the two competitors were being treated differently. Both Remington and IBM submitted with their ruling requests material descriptive of the systems as to which rulings were sought. (Pet., pp. 2a, 32a-33a). The material was extensive and made clear that the systems were identical for tax purposes, a fact at no time questioned by the Service. Moreover, the Commissioner knew that on the basis of his ruling Remington was protected by Section 1108(b) of the Revenue Act of 1926, 44 Stat. (Pt. 2) 114, which provides that an excise tax may not be recovered from a manufacturer who, in reliance on a ruling, fails to collect the tax from its customers. See Treas. Reg. § 601.201(1)(8).

Upon his receipt of IBM's request of July 13, 1955, there were three possible rational courses of action open to the Commissioner. He could have (1) resolved doubts as to the taxability of both systems promptly and put his decision into effect as to both competitors. Or, if he found it impossible to reach a prompt decision, he could have either (2) given IBM

a ruling identical to Remington's, knowing that if he were later to decide the systems were taxable he could issue a new prospective ruling; or (3) rescinded Remington's ruling and compelled both competitors to act at their peril while he made up his mind. He then could have made his ultimate decision effective as to both competitors, retroactively or prospectively as the circumstances warranted.

The Commissioner did none of these things. He took no action on IBM's request for nearly two and a half years and allowed Remington's ruling exempting its systems from tax to remain in effect for that period and longer. As the Commissioner later explained, again through the Chief of the Excise Tax Branch, the Service entered upon an "extensive study of the question of the taxability of electronic calculating or computing equipment . . . ."[2] (Pet., p. 36a). Throughout the period of this study IBM necessarily continued to collect and pay the tax, since if it failed to

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[2] The inference that might be drawn from the Government's repeated references to taxes "concededly owed" (Pet., p. 2; see also *id.* at 5, 14) that there was never any doubt that a tax was due is wholly unfounded. Remington's ruling of nontaxability was signed by a high official, the Chief of the Excise Tax Branch of the Internal Revenue Service. Moreover, the Service had a genuine problem in determining to what extent a tax on business machines first enacted in 1941 should apply to electronic computers not conceived of at that time. Its difficulties in this respect persisted beyond the time that it finally resolved the question of the taxability of the systems involved in this suit. The complexity of the question was reported to Congress in 1960. See Staffs of Joint Committee on Internal Revenue Taxation and Treasury Department, Explanatory Statement on the Technical Amendments Bill of 1960 (H.R. 9625 and H.R. 9626), at 11 (1960); 106 Cong. Rec. 13172 (1960).

do so and were eventually held liable it would have been wholly impracticable for it to recoup the amounts of tax not passed on to its customers. Remington, being protected by its ruling, did not collect or pay the tax on its identical and competing machines. During this lengthy period, then, the effect of the Service's action on behalf of Remington and its studied inaction with respect to IBM was to impose on IBM an added cost equal to 10 per cent of the sales price. The result was a 10 per cent penalty on a purchaser who chose to purchase or lease the same system from IBM rather than Remington.

During the two-and-a-half-year period first IBM and then Remington filed claims for refunds of excise taxes paid on their respective systems prior to the time of Remington's ruling. The Commissioner was as silent on IBM's claim for a refund as he was on its urgent request for a ruling. However, in July 1956 the Commissioner granted Remington's later-filed refund claim and returned to Remington an amount representing taxes collected and paid by it from 1952 to 1955. (Pet., pp. 37a-38a).

On May 1, 1957, the Chief of the Excise Tax Branch wrote Remington that, on further consideration, the Service had concluded that the computer systems in question were taxable as business machines. The Service therefore proposed to revoke, prospectively only, its ruling of April 15, 1955. (Pet., pp. 33a-34a). However, the letter continued, "we will withhold further action on the matter for a period of thirty days from the date of this letter in order to afford you an opportunity, should you so desire, of submitting a pro-

test or requesting a hearing in the case." Remington took advantage of this offer, both conferring with the Service and subsequently submitting its views in writing. (Pet., pp. 34a-35a). On December 3, 1957, the Service wrote Remington that it had finally concluded that the computers were taxable. The Service, however, exercised its discretion under Section 7805(b) by providing that the tax would apply only to transactions occurring on and after February 1, 1958. (Pet., pp. 36a-37a). The Service was not barred by any statute from recovering the amount refunded to Remington in 1956 representing taxes paid before Remington received its ruling, but it deliberately decided, by making the revocation wholly prospective, to forgo the opportunity to reclaim this amount.[3]

On November 26, 1957, the Service finally acted on the request for a ruling that IBM had filed more than two years before with an urgent plea for equality and expedition. The Service denied the request for a favorable ruling and stated its conclusion that IBM's systems were taxable. The ruling, unlike the contemporaneous ruling to Remington, was made retroactive. (Pet., pp. 35a-36a). The communications to IBM and Remington left no doubt that the responsible officials knew that identical systems of competing manufacturers were involved. Remington was informed that its ruling of April 1955 was being revoked "to correct a certain competitive irregularity which now exists," and IBM was told that "the manufacturer of the machines which compete with and are similar to" IBM's machines "is being appropriately advised by us re-

[3] Section 1108(b) of the Revenue Act of 1926 (p. 3, *supra*) was not applicable to the amount refunded, and the statute of limitations had not run.

garding the taxability of such machines of its manufacture."

IBM in April 1958 filed a second refund claim for the period June 1, 1955, to January 31, 1958, the date after which the Commissioner commenced to exact from Remington the tax that IBM had been paying all along. The Commissioner took no action on either this claim or the refund claim IBM had filed back in 1955 until February 3, 1959, when he denied both of them. (Pet., p. 38a).

As a result of these events, IBM was held liable for the 10 per cent excise tax on all of its systems of the types involved in this litigation that were sold or leased during the period June 1951 through January 1958. Remington was absolved of the tax on the identical systems of its manufacture for this period—for the period after April 1955 by the Service's ruling of that month which was later revoked prospectively only, and for the period prior to April 1955 by the refund the Service awarded to Remington in July 1956 on the basis of that ruling.

IBM brought this suit in the Court of Claims for the amounts it would have received as refunds, or would have been absolved from paying, had the Commissioner accorded it equal treatment with Remington. That court held in favor of IBM on the ground that in "the totality of the circumstances" presented (Pet., p. 10a), which were entirely of the Commissioner's own making, it was an abuse of the discretion delegated by Section 7805(b) of the Internal Revenue Code for the Commissioner in applying his ultimate determination to IBM to "opt for retroactivity" where non-retroactivity was "imperative" (Pet., p.

18a). Some 3,200 customers of IBM have executed the consents provided for in Section 6416(a)(1) of the Code, and IBM has agreed to pass on to them by far the greater part of any recovery it has—all except about $252,000 in taxes paid by it on systems put to its own taxable use.

REASONS FOR DENYING THE WRIT

The decision of the court below is a clearly correct application of an established principle to a highly particularized and aggravated factual situation. The situation is that the Commissioner of Internal Revenue knowingly and without excuse or explanation created a gross inequality in the administration of the tax laws, allowed it to persist over a long period and then failed to use the authority Congress had given him to correct the inequity he had created. In holding that the Commissioner may not lawfully act in such an arbitrary manner, the decision of the court below does not conflict with any decision of any court and is entirely consistent with the principles governing the Commissioner's exercise of discretion under Section 7805(b) of the Code, as laid down by this Court in *Dixon* v. *United States,* 381 U.S. 68, and *Automobile Club of Michigan* v. *Commissioner,* 353 U.S. 180. Neither the decision itself nor the inferences reasonably to be drawn from it pose any threat to the system under which the Internal Revenue Service issues letter rulings. Accordingly, review by this Court is not warranted.

1. The Government contends that this Court's decision last term in *Dixon* v. *United States, supra,* "compels the conclusion" that the holding below is

incorrect. (Pet., p. 7). The contention is unfounded; the decision below is entirely consistent with *Dixon*.

In *Dixon*, the Commissioner of Internal Revenue had acquiesced in a Tax Court decision, *George Peck Caulkins*, 1 T.C. 656 (1943), *aff'd*, 144 F.2d 482 (6th Cir. 1944), holding proceeds from the retirement of a certain type of debt security taxable as capital gains. Subsequently, the Commissioner ruled that the proceeds from a class of transactions that included, but was broader than, the type of transaction involved in *Caulkins* were taxable as ordinary income. This ruling was applied retroactively except that as to the subclass of transactions involved in *Caulkins* it was applied prospectively only.

The petitioners in the *Dixon* case had realized gains which the Commissioner's ruling made taxable as ordinary income. They contended that he should have given them equal treatment with the holders of the *Caulkins* securities. The petitioners also made the quite separate contention that, wholly apart from their claim to equal treatment, the Commissioner abused his discretion in making his later ruling retroactive as to *anyone* who had relied on the earlier acquiescence.

The Government here quotes and relies on what the Court ruled in answer to the second of these contentions: that "the Commissioner's acquiescence in an erroneous decision, published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due." (Pet., p. 6). But this holding is inapplicable and irrelevant here. The right of the Commissioner to make his rulings retroactive, as long as no discrimination is involved, was not at issue in this case. It is the portion of the *Dixon*

opinion that deals with the argument founded on alleged discrimination that is relevant here.

In its discussion of this point the Court recognized, without indicating any disagreement, the principle that " 'the Commissioner cannot tax one and not tax another without some rational basis for the difference,' " 381 U.S. at 77 n. 9, and cited a number of cases that support the principle, including two Court of Claims decisions that the Government calls in question here. *Exchange Parts Co.* v. *United States,* 279 F.2d 251 (Ct. Cl. 1960); *Connecticut Ry. & Lighting Co.* v. *United States,* 142 F. Supp. 907 (Ct. Cl. 1956). (See Pet., pp. 14-15.)

The Court then considered whether the Commissioner had in fact taxed one group of taxpayers differently from another without some rational basis for distinguishing them. It held that he had not, since the circumstances of the two groups of taxpayers and the transactions were not so similar as to require the Commissioner to treat them alike. The *Caulkins* decision, the Court held, had been based on a quite limited rationale and could not fairly be extended to the securities owned by the petitioners and to the type of transaction in which they had engaged. The Court held that the petitioners had the burden of showing that the *Caulkins* securities "could not rationally be distinguished from" their own, 381 U.S. at 79, and had not sustained this burden.

Thus, a premise of the Court's analysis in *Dixon* is that, in determining whether the Commissioner had abused his discretion, it was material to decide whether the petitioners there and the taxpayers who received non-retroactive rulings owned securities that "could

not rationally be distinguished." The same principle had previously been recognized by this Court in *Automobile Club of Michigan* v. *Commissioner,* 353 U.S. 180. In sustaining an exercise of the Commissioner's power to make a tax ruling retroactive in that case, the Court was careful to inquire whether all taxpayers similarly situated had been treated equally in the making of the ruling. 353 U.S. at 185-86.

In the present case it is conceded that IBM and Remington were similarly situated in all relevant respects, that their computer systems were identical for tax purposes and that the transactions involved were identical. There is no conflict in legal principle between this case and *Dixon;* it is simply that the elements of discrimination and resulting abuse of discretion that characterize the Commissioner's conduct here were not present in *Dixon.*

2. The decision below rests upon an interpretation of Section 7805(b) of the Internal Revenue Code. The same statute governed the decisions in the *Dixon* and *Automobile Club* cases. Plainly that section vests the Secretary of the Treasury's delegate, the Commissioner of Internal Revenue, and his staff with discretionary authority to make rulings relating to the internal revenue laws retroactive or non-retroactive as circumstances seem to counsel. Like any other discretionary power, this authority is subject to abuse. While the petition nowhere squarely admits this, it is clear that abuse of discretion in the administration of Section 7805(b) is reviewable by the courts on familiar principles. This Court so held in the *Automobile Club* case. And as we have indicated, the Court there recognized further that whether taxpayers similarly situated are afforded equal treatment is a highly relevant

factor in determining whether discretion has been abused or not:

> "We must, then, determine whether the retroactive action of the Commissioner was an abuse of discretion in the circumstances of this case .... The Commissioner adopted the General Counsel's interpretation and proceeded to apply it, effective from 1943, *indiscriminately* to automobile clubs. We *thus* find no basis for disagreeing with the conclusion . . . that the Commissioner, *having dealt with petitioner upon the same basis as other automobile clubs,* did not abuse his discretion." 353 U.S. at 185-86. (Emphasis added.)[4]

Other decisions have likewise recognized that conscious, aggravated discrimination between taxpayers similarly situated is a factor to be considered in determining whether the Commissioner has abused his discretion under Section 7805(b).[5] The decision below therefore is no novelty or departure from consistent interpretations of the tax laws.

The only question in the present case was whether on the facts presented the Commissioner had abused

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[4] Other cases that have recognized the reviewability of discretionary determinations under § 7805(b) are Lesavoy Foundation v. Commissioner, 238 F.2d 589 (3d Cir. 1956), and Goodstein v. Commissioner, 267 F.2d 127 (1st Cir. 1959); see generally Caplin, "Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles," N.Y.U. 20th Inst. on Fed. Tax. 1, 17-26 (1962), and Lynn & Gerson, "Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies," 19 Tax L. Rev. 487, 505-16 (1964).

[5] Exchange Parts Co. v. United States, 279 F.2d 251 (Ct. Cl. 1960); Connecticut Ry. & Lighting Co. v. United States, 142 F. Supp. 907 (Ct. Cl. 1956); City Loan & Savings Co. v. United States, 177 F. Supp. 843 (N.D. Ohio 1959), *aff'd,* 287 F. 2d 612 (6th Cir. 1961); Brecklein v. Bookwalter, 231 F. Supp. 404 (W.D. Mo. 1964).

his discretion. The court below held that he had. That holding was clearly justified by the evidence and by the court's findings. The holding was upon a record showing what must be a nearly unique course of delay and mistakes on the part of the Service resulting in "a manifest and unjustifiable discrimination against" IBM. (Pet., p. 17a). The Government does not assert even now that there was any rational basis for the course of action followed by the Commissioner. Its defense rather is that the taxes in question were levied by Congress, and accordingly the manner in which the Commissioner discriminated between taxpayers is quite immaterial.

In so defending, the Government ignores Section 7805(b) and the powers it creates in the administration of the tax laws. That section is part of the Internal Revenue Code; it represents a decision by Congress that in certain circumstances taxes, even though they would otherwise be due, should not be collected where their collection would be inequitable and unfair. The Government simply ignores this decision by Congress when it repeatedly describes the holding below as, for example, permitting taxpayers "to escape taxes which they owe" (Pet., p. 16). Section 7805(b) bears just as much on what taxes are "owed" as any other section of the tax code. It authorizes, indeed enjoins, the Commissioner to make a ruling prospective when considerations of fairness and equity so require.[6] If the circumstances are such, as they were in this case, that it was an abuse of dis-

[6] As the Court observed in Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 184, § 7805(b) empowers the Commissioner "to limit retroactive application to the extent necessary to avoid inequitable results."

cretion for the Commissioner to make his ruling retroactive, then the taxes were not "owed"; to the contrary, they were improperly paid and should be refunded.

The Commissioner regularly and in the routine discharge of his administrative duties forgives taxes that, in the terms of the petition here, are "owed." He does so when he makes a ruling effective prospectively on the ground that a prior ruling or rulings have been inconsistent with it. Moreover, it is not the case that the Commissioner so exercises his discretion under Section 7805(b) only when the prior ruling has been published.[7] In many instances he has made a ruling prospective only for an entire industry because of inconsistency with prior unpublished rulings issued to one or several members thereof or a position informally taken. See, *e.g., Rev. Rul.* 57-611, 1957-2 Cum. Bull. 730; *Rev. Rul.* 58-582, 1958-2 Cum. Bull. 768; *Rev. Rul.* 59-112, 1959-1 Cum. Bull. 307; *Rev. Rul.* 59-262, 1959-2 Cum. Bull. 249; *Rev. Rul.* 60-391 1960-2 Cum. Bull. 299.

The Government makes much of the fact that there was no "reliance" by IBM in this case. (Pet., pp. 13-14). As the rulings cited in the preceding para-

[7] The Government attempts to attach significance to the fact that the rulngs here in question were not published (Pet., pp. 7-10), implying that the ordinary limitations on the exercise of discretion can therefore be ignored. The short answer to this suggestion is that § 7805(b) makes no distinction between published rulings and rulings issued to particular taxpayers by letter or otherwise and thus gives the Service the same discretionary authority and responsibility as to retroactivity in the case of either type of ruling. Rulings are published when they are thought to have significant value as precedents. Naturally, a ruling affecting only two taxpayers would not be selected for publication.

graph make clear, the Commissioner does not insist upon reliance, in the sense of a person's not having paid a tax, in his own excise-tax rulings practice.[8] It is enough to justify prospective treatment for all that there has been a private ruling or a position taken that was generally known, and no showing of actual reliance by any particular taxpayer is required. Here, of course, the ruling to Remington was known to all who were interested, the two competitors and their customers. But at bottom reliance, as the term is customarily used in the cases, is irrelevant to excise-tax cases. Reliance upon a ruling as to the income-tax consequences of a prospective transaction may well be an element in proving that harm was caused by the Government's retroactively withdrawing its ruling after the transaction was entered into. In the excise-tax situation the damage caused by having some percentage of the sales price added to a manufacturer's costs is direct and immediate.

Finally, the Government is simply wrong in urging that in no circumstances is the standard of fairness that the Commissioner has adopted for his own guidance judicially enforceable. The Government says that "we know of no legal principle that compels the

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[8] At one time the Commissioner's practice was to require some kind of "reliance," making rulings that reversed positions favorable to taxpayers prospective except that refunds would not be allowed to those who had been paying their taxes. *E.g.*, Rev. Rul. 55-318, 1955-1 Cum. Bull. 509; Rev. Rul. 55-533, 1955-2 Cum. Bull. 642; Rev. Rul. 56-189, 1956-1 Cum. Bull. 503. The practice was abandoned about the time the Court of Claims held that to draw a distinction between a taxpayer who had paid his tax and one who had not was to discriminate arbitrarily and illegally. Connecticut Ry. & Lighting Co. v. United States, 142 F. Supp. 907 (Ct. Cl. 1956); see also Exchange Parts Co. v. United States, 279 F.2d 251 (Ct. Cl. 1960) (involving Rev. Rul. 56-189, *supra*).

Commissioner, once he has erroneously permitted one taxpayer to escape liability, to . . . permit another similarly to escape liability in the name of 'equality of treatment.'" (Pet., p. 11). Mr. Justice Frankfurter has aptly stated the very principle that the Government rejects: "The Commissioner cannot tax one and not tax another without some rational basis for the difference." *United States* v. *Kaiser,* 363 U.S. 299, 308 (concurring).[9] The principle is broader than its expression in Section 7805(b). Even were that section not in the Revenue Code, the constitutional prohibition against knowing and deliberate discrimination between taxpayers identically situated would still apply. Where that principle has been violated, the proper remedy is the refund of the tax discriminatorily collected even though that is the correct tax owed according to the tax law on the statute books. *E.g., Sioux City Bridge Co.* v. *Dakota County,* 260 U.S. 441, *Township of Hillsborough* v. *Cromwell,* 326 U.S. 620.

In summary, the Government does not deny that the Commissioner had power under Section 7805(b), by making his ruling prospective, to correct the effects of his delay of more than two years in ruling on IBM's

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[9] This Court has often recognized that "a cardinal principle of Congress in its tax scheme is uniformity, as far as may be." United States v. Gilbert Associates, Inc., 345 U.S. 361, 364, quoted with approval in United States v. Brosnan, 363 U.S. 237, 241. "We should be slow to attribute to Congress a purpose producing such unequal treatment among taxpayers, resting on no rational foundation." United States v. Gilmore, 372 U.S. 39, 48. "[A]s we have often had occasion to point out, the revenue laws are to be construed in the light of their general purpose to establish a nation-wide scheme of taxation uniform in its application." United States v. Pelzer, 312 U.S. 399, 402.

request for simple competitive parity; it does not forthrightly deny what this Court has held, that exercise of the discretion given to the Commissioner by Section 7805(b) is reviewable for abuse. The question, then, comes down to whether the facts here—which were of the Commissioner's own creation—made it an abuse of discretion not to act prospectively in the cases of both competitors instead of retroactively as to one and prospectively as to the other. We submit that the court below was plainly correct on its view of what the facts demanded, so that its decision was an unexceptionable application of principles this Court has held inhere in Section 7805(b).

3. The Government, making no real effort to justify the course of action followed by the Commissioner, a course which even the dissenting judge below regarded as "deplorable" (Pet., p. 30a), seeks review by this Court largely on the ground that the decision below will necessitate significant changes in the system under which the Internal Revenue Service issues letter rulings. (Pet., pp. 11-13, 14-16). To the extent that any changes are necessary to prevent a recurrence of what has happened here, surely they are in order and if they have not been made should be made as quickly as possible. We do not believe that the Government seeks a license to repeat with impunity what the Commissioner has done and has failed to do here.

Presumably, however, the Government is apprehensive that broader changes will be necessitated. It sees the decision below as "fraught with alarming ramifications" prejudicial to the administration of the tax laws. (Pet., p. 11). At worst, those ramifications, which are elsewhere described as posing a "serious

threat" to the rulings system (Pet., p. 5), are something less than horrendous. It is claimed that fewer rulings can be issued if a ruling is to be regarded as anything more than a private compact between the Service and an individual taxpayer (Pet., pp. 2, 8, 12), and that more time will be required to process rulings (Pet., p. 16).[10]

Even these consequences, however seriously they may be viewed, flow not from the decision of the court below but from what the Government perceives quite erroneously as the "far-reaching implications" of the decision. (Pet., p. 14). The decision of the court below does not hold or imply, as the Government repeatedly asserts, that a taxpayer has the right to take advantage of any error made by the Service in dealing with any other taxpayer. The court carefully distinguished the line of cases that includes *Weller* v. *Commissioner,* 270 F.2d 294 (3d Cir. 1959), *cert. denied,* 364 U.S. 908, quoted by the Government (Pet., p. 12), holding that, as the court put it, "one taxpayer has no right to rely on an incorrect private ruling to another" (Pet., p. 19a). The court did not decide "that IBM had a right to invoke or rely upon Remington's private ruling" but rested on the different ground that IBM was entitled to have its ruling in

[10] It is hardly the province of this Court or any other court to tell the Revenue Service how many rulings it should issue or how much time it should spend on each ruling. It is the province of the courts, however, to review administrative action whether by the Commissioner of Internal Revenue or any other official of the executive department to protect against abuse of discretion. In a limited number of situations, such abuse may be found. Where it is found, it is surely the function of the Executive to effect such corrections in its procedures as appear necessary or appropriate to prevent repetition.

response to its request "controlled by the standard of equality and fairness incorporated in Section 7805 (b)." (Pet., p. 20a).

That standard, the court properly held, required non-retroactivity, not because the Service had "erred" with respect to Remington, but because of "the totality of the circumstances" (Pet., p. 18a) surrounding its treatment of IBM. The Commissioner had, and let pass, a number of opportunities to act without incurring liability to IBM or any other taxpayer. Ultimately, it was what the Commissioner did and failed to do to IBM and not the error he made in dealing with Remington that gave rise to the liability found by the court below.

The decision below, therefore, neither in its holding nor in its implications, allows a taxpayer to take advantage of any error made by the Service in favor of another taxpayer. Like most cases involving an alleged abuse of discretion, this case turns on its particular facts. Those facts did not consist of a single error of law or fact made by the Service as to the proper construction of the taxing statute. They presented rather a systematic and consistent course of substantive and procedural discrimination extending over a long period and carried out with full knowledge of all the relevant facts.[11] If the decision stands, we have no doubt that the Government will be the first to deny that it represents a "holding that a taxpayer may escape liability for tax it owes because of an erroneous

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[11] As the court below observed, there is no charge of "malevolence" on the part of the Government officials concerned. (Pet., p. 17a).

ruling given to another taxpayer." (Pet., p. 14). The Court of Claims has had no difficulty in distinguishing this case when, in subsequent cases, it was argued to be controlling in circumstances where an abuse of discretion had not been established. See *Knetsch* v. *United States,* 348 F.2d 932, 940 n. 14 (Ct. Cl. 1965); *Bornstein* v. *United States,* 345 F.2d 558, 564 n. 2 (Ct. Cl. 1965).

Neither the holding nor the fair implication of the decision of the court below is that the Government is accountable for every error, inconsistency or inadvertence committed in the administration of the tax laws. What the decision does mean is that the Commissioner in the exercise of his considerable powers, including his authority under Section 7805(b), must act rationally in the light of all the circumstances known to him. One must assume, and surely hope, that the behavior of the Service here represents a wholly atypical departure from the standards of administrative efficiency and fairness it normally displays. The court below invoked a well-established principle peculiarly suitable for correcting aberrations such as that involved here—judicial review to correct abuse of administrative discretion. Surely the Revenue Service is not and should not be immune from such review. Indeed, at least since *Automobile Club of Michigan* v. *Commissioner,* 353 U.S. 180, was decided, it should have known that there were limitations on the exercise of discretion by the Commissioner under Section 7805(b). It is, therefore, hardly credible that a decision that there has been an abuse of discretion in this highly particularized situation will entail sweeping changes in the operations of the Service.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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